

CLEAN WATER ACT (CWA) SECTION 404 ASSUMPTION RULEMAKING AND ACTIVITIES

BACKGROUND:

- States and tribes have cited various reasons for not assuming the CWA Section 404 program including lack of dedicated federal funding, inconsistency between state and federal authorities, lack of partial assumption authority, and lack of clarity on which waters of the U.S. the Army Corp of Engineers (Corps) retains. Michigan and New Jersey are the only states that currently administer the Section 404 program.
- The EPA established a Federal Advisory Committee Act (FACA) subcommittee in 2015 to provide recommendations on how the EPA could clarify which waters states and tribes may assume under CWA Section 404(g) for purposes of issuing dredged or fill permits. The recommendations were submitted to the Administrator in June 2017.
- In August 2018, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps clarifying which waters states and tribes may assume, which is consistent with the subcommittee's majority view regarding retained waters.
- Florida has indicated its intent to assume the Section 404 program and the EPA has been actively working with them including trying to resolve Endangered Species Act issues. The state is currently working on issuing for public comment their final implementing regulations for the program.

KEY POINTS:

- Congress gave states and tribes the authority to assume the CWA Section 404 dredged and fill permitting program for certain waters within their state/tribal boundaries. Under Section 404(g) the EPA approves state and tribal requests to assume the program.
- The EPA has worked with various states and tribes over the years who have considered assumption, but for various reasons chose not to pursue the program. Currently we are actively working with Florida, Indiana, Arizona, Oregon, Minnesota, Nebraska, and others who have expressed potential interest.
- In response to input from states and tribes, the Agency initiated a rulemaking to revise our 1988 regulations to clarify and modernize the regulations.
- The pre-proposal tribal consultation concluded in December 2018 and states submitted recommendations in January.

TALKING POINTS:

- The Administration is taking action to better balance the responsibilities for protecting our environment between the federal government and states.
- The EPA has initiated a rulemaking to modernize our existing assumption regulations to reduce barriers for states and tribes to assume the Section 404 permitting program.
- The Department of the Army issued a memorandum that carries out recommendations made by a Federal Advisory Committee to clarify how permitting for activities in waters of the U.S. can be split between the Corps and a state or tribe.
- By empowering states and tribes to take on this permitting responsibility, we can achieve greater efficiencies in infrastructure and other permitting decisions while continuing to protect the environment.